



Fox Rothschild LLP
ATTORNEYS AT LAW

2000 Market Street, 20th Floor
Philadelphia, PA 19103-3222
Tel 215.299.2000 Fax 215.299.2150
www.foxrothschild.com

November 11, 2013

VIA FACSIMILE (267-299-5069)

The Honorable Paul S. Diamond
United States District Judge
United States District Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Re: Marino v. Raymond, et al.
11-cv-6811 (PSD)

Dear Judge Diamond:

We write on behalf of our Moving Defendants to respectfully request that your Honor strike from the record Plaintiff's **30-page** Omnibus Sur-Reply Brief In Opposition To Defendants' Reply Briefs for Summary Judgment (the "Sur-Reply") filed on Sunday evening.¹

The title of the Sur-Reply shows why it should be stricken: It is neither a "reply" nor a "supplemental brief." See Judicial Practice and Procedures for your Honor. And neither the Federal Rules of Civil Procedure nor the Local Rules of the Eastern District of Pennsylvania permit the filing of a sur-reply by the party opposing a motion. Plaintiff's goal is to get the last word on summary judgment.

The Sur-Reply, which makes several new arguments, cites different cases, and is nearly as long as Plaintiff's initial opposition, materially misstates the law and facts. It will require the Moving Defendants to file another submission to correct those misstatements. Plaintiff's tactic

¹ We represent Usher Raymond IV a/k/a Usher, Sony Music Entertainment, EMI April Music Inc., EMI Blackwood Music Inc., Warner-Tamerlane Publishing Corp., UR-IV Music, Inc., Bystorm Entertainment, Mark Pitts, Issiah Avila, Bobby Ross Avila, Sublime Basement Tunes, Defenders of Music, Flyte Tyme Tunes, James Samuel Harris III, and Terry Steven Lewis.

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of using the initial opposition as a trial run, and then contriving arguments to attempt to respond to the Moving Defendants' Reply, should not be countenanced. It "multiplies the proceedings ... unreasonably and vexatiously," 28 U.S.C. § 1927, and ignores that the motion was fully briefed when the Moving Defendants filed their permissible reply.

For all of these reasons, Plaintiff's Sur-Reply should be stricken. But if your Honor does not strike the Sur-Reply, our Moving Defendants respectfully request an Order granting them eight days from your decision on this request to file the last and final brief on the pending motion.

We thank the Court for its consideration of this request.

Respectfully submitted,

Michael Eidel

cc: Francis A. Malofiy, Esq.
Jonathan D. Davis, Esq.
Derek Williams, Esq.
Mark S. Lee, Esq.
Lance Rogers, Esq.
Mr. Thomas van Dell (*Pro Se*)
Matthew S. Olesh, Esq.
(All Via Email/PDF concurrently with transmission of this letter to the Court)